

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

IN RE: . Case No. 01-1139  
. .  
W.R. GRACE & CO., .  
et. al., . USX Tower - 54th Floor  
. 600 Grant Street  
. Pittsburgh, PA 15219  
Debtors. .  
. February 5, 2007  
. . . . . 1:01 p.m.

TRANSCRIPT OF HEARING  
BEFORE HONORABLE JUDITH K. FITZGERALD  
UNITED STATES BANKRUPTCY COURT JUDGE

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1 (Attorneys are not always clear)

2 THE COURT: Good afternoon.

3 UNIDENTIFIED ATTORNEY: Good afternoon.

4 THE COURT: This is the matter of W.R. Grace, 01-1139  
5 pending in the District of Delaware. Everyone is participating  
6 by phone. The parties I have listed are David Parsons, Raymond  
7 Mullady, Scott Marshall, Deirdre Pacheco, Alan Rich, Daniel  
8 Hogan, Robert Phillips, Paul Matheny, Kenneth Thomas, Mark  
9 Shelnitz, David Klingler, John Herrick, Christopher Candon, Jay  
10 Sakalo, Debra Felder, David Austern, Theodore Tacconelli,  
11 Kathryn Keller, Mark Meyer, Janet Wardblack, Andrea Marino,  
12 Stephen Vogel, Kathleen Farinas, Christina Skubic, Peggy  
13 Farber, Mike Riley, David Hickerson, James O'Neill, Sander  
14 Esserman, Van Hooker, Thomas Wilson, Nathan Finch, Mark  
15 Hurford, Scott McMillin, Brian Stansbury, Natalie Ramsey,  
16 Michael Prascik, David Bernick, Janet Baer, Leonard Busby, Noel  
17 Burnham, Ken Pasquale, Andrew Craig, Barbara Harding, Jay  
18 Hughes, Lewis Kruger, Irwin Zandman, Kathy Byrne, and that is  
19 all.

20 I'm not sure who is on the phone from Pittsburgh;  
21 however, because -- Jan, could you tell me, please?

22 THE CLERK: Yes, (indiscernible) is in the courtroom.  
23 And I'm here.

24 THE COURT: Okay, thank you. Did I miss anyone on  
25 the phone? All right.

1 THE CLERK: Judge, could you just remind parties when  
2 they speak just to state their name for the record.

3 THE COURT: Yes, please, everyone, when you speak  
4 -- because everyone is by phone, please identify yourself for  
5 the record. Mr. Bernick?

6 MR. BERNICK: Yes, thank you, Your Honor. I hope  
7 that you have timely escaped what is a very severe cold front  
8 that went through our part of the United States.

9 THE COURT: That seems to be about 90 degrees here  
10 right now.

11 MR. BERNICK: Right.

12 THE COURT: So, yes, I'm definitely in the preferred  
13 location.

14 MR. BERNICK: Right. You know this has a significant  
15 amount of history -- this issue. And unless there's a need for  
16 it, I think the more productive thing to do is try to figure  
17 out how to solve what I think has got to be all counts a  
18 problem. And do so in a way that causes the least pain to all  
19 concerned, but still gets us the information that we need.

20 We sent through both on Friday and then again -- Your  
21 Honor, some of the data that tries this issue -- and I'm not  
22 going to go over all the details. But I think that the top  
23 line is that out of approximately 5,900 claimants, who by our  
24 account have referred to x-rays in connection with the  
25 complaint for lung cancer -- we have accounted for

1 approximately -- I'm kind of eye-balling it -- about 5,300 of  
2 them, meaning that others have not yet been processed. And of  
3 those 5,300, there are only 704 claimants who have actually  
4 submitted the x-ray to Rust (phonetic) with the acceptable  
5 -- with the appropriate certification. That is to say, Your  
6 Honor expressed the preference that would be (indiscernible) in  
7 your order of December 22 states, the people should submit  
8 copies of x-rays with certification of the same thing for  
9 purposes of our proceeding, as the original.

10           Only 704 claimants have done that, coming from 23 law  
11 firms. There are a total of 910 claimants who have submitted  
12 the x-rays. They come from about 17 law firms, have not  
13 submitted any certification. And then we have approximately  
14 3,783 claimants who have basically said that it is not  
15 practical to certify. And therefore, (indiscernible) come to  
16 review the x-rays in their law office. Thereby taking us back  
17 to where we were back in December, which is the -- it is a  
18 impossibility for us to get the reviews done because we  
19 wouldn't have to troop around with our various experts because  
20 to get where -- not one but three kinds of in accordance with  
21 the appropriate standard, we'd have to get those experts to  
22 show up in various permutations of 39 different cities to look  
23 at various collections of x-rays. It's just -- it's just not  
24 going to work.

25           What we would like to propose is -- are really two

1 possible solutions. And the solutions are of different kinds.  
2 The first solution is to -- and this would be of course with  
3 respect to anybody does not submit the properly certified copy.  
4 We would have them -- have the original x-rays available in  
5 three different repositories geographically situated around the  
6 United States. They would be places where there are  
7 significant collection of claimants.

8           These would be repositories incidentally that would  
9 not pose the custody issue. I'm not saying that the custody  
10 issue has been properly characterized by the other side. But  
11 to avoid any custody issue, these would repositories that are  
12 run by folks who act on behalf of the claimants and their law  
13 firms alone. So, they are technically agents of those law  
14 firms. We could get a repository in the New York area, the  
15 Texas area, and then I have a preference for Chicago as perhaps  
16 Mr. Cooney does, as well. But we're thinking about Chicago.

17           It is not difficult to locate facilities of these  
18 different jurisdictions that can act as a repository. There's  
19 no rocket science associated with this. Basically, somebody  
20 gets space that's rented. We would pay for the rent for the  
21 space. And is basically a secured facility so the people can  
22 send the x-rays there, and they can be -- they can be viewed.  
23 It seems to us that that is a reasonable compromise that's  
24 designed to get us to where we need to be.

25           Now, I in fact have inquired of different folks in

1 the interim to see whether they might already be a facility in  
2 existence that have handled these kinds of things, that still  
3 handle them today. But I think that that's probably a subject  
4 for a more detailed discussion that warrants taking up Your  
5 Honor's time. But that would be one solution.

6           The second solution may be somewhat simpler which has  
7 been bearing in mind this proceeding is really kind of -- it's  
8 a proceeding for estimation. And that really is the be all and  
9 the end of all of the problems. It's not designed to actually  
10 adjudicate the merit of any claim or to allow or disallow it.

11           We simply ask the Court to enter an order about the  
12 implications or to spell out the implications of not having the  
13 certified copy. It seems to me that there are two things that  
14 that order could say. One is that where a copy is furnished,  
15 that is, the X-ray is sent through -- that if there is not a  
16 certification, the copy is deemed to be identical for  
17 estimation purposes to the original. Nobody is hurt by that in  
18 the sense that it doesn't -- it doesn't adjudicate whether the  
19 claim is going to be allowed or not. But effectively, what it  
20 does is to say that if all they've got is the copy, the copy is  
21 all that we can use. It is deemed to be the same as the  
22 original for purposes of the estimation.

23           If there is no copy and no original that's furnished,  
24 that seems to be the given all of the effort has been  
25 undertaken to obtain the certified copy. The order would then

1 provide that instance -- the x-ray is deemed not to provide  
2 evidence of an asbestos related need.

3           And be careful on that. We're talking about lung  
4 cancers. So, this is not a statement that people don't have  
5 lung cancer. The purpose of looking for the x-ray was to  
6 determine whether there is evidence of fibrosis that would be  
7 consistent with exposure to asbestos. So, this is not that  
8 there's not lung cancer, just that it's not evidence of  
9 asbestos-related disease that it's the lung cancer is due to  
10 asbestos. Maybe that there are other sources of data that are  
11 available to the claimant, that enables us to say, yes, it is  
12 asbestos-related, but the x-ray would be deemed not to provide  
13 evidence to support the assertion of asbestos-related disease.

14           If Your Honor would enter that order, then it  
15 obviates the need to go through the process of finding the  
16 repositories and people can make up their minds what they want  
17 to do.

18           We would be happy -- not happy, but we would be -- we  
19 believe it would be satisfactory to go down either road. We  
20 have no preference that way. But we need to get to a position  
21 yesterday where we effectively have what it is that we need to  
22 be able to test what's going on with these lung cancer  
23 claimants.

24           And it seems to us that at this stage there really  
25 isn't too much options. We cannot send people around to law

1 offices and you know kind of orchestrate a very elaborate  
2 Waltz, Tango, pick your dance, it's just not feasible to  
3 accomplish.

4 THE COURT: Mr. Esserman?

5 MR. ESSERMAN: Yes, Your Honor, this is Sandy  
6 Esserman. One minor thing, and I want to try and stick to the  
7 guts of the issue. But we know that certain materials have  
8 been sent to the Court, and we're getting them two or three  
9 hours after the Court is getting them. And we would -- we  
10 think that when in fact the Court is sent exhibits or papers,  
11 we ought to be getting them at the same time, not two or three  
12 hours later which is like an hour or so before the hearing.  
13 That's an obvious statement. And I don't think it really  
14 merits further discussion.

15 MR. BERNICK: Well, let me just say because -- it's  
16 inevitably because it was said, it's presumably (indiscernible)  
17 the Court's consideration. We apologize. We didn't copy -- we  
18 didn't just -- it isn't a question clerical support, we sent  
19 out separate e-mails with the identical information that was  
20 sent within, I think minutes, of this transmission to the  
21 Court.

22 MR. ESSERMAN: Well, not ours. And we've got the  
23 e-mails to show it. But regardless, I know you don't do that  
24 intentionally. And just make sure it doesn't happen again.  
25 First, I'd like to say that the firms that we represent, and I

1 think the firms in general, have in general complied with the  
2 x-ray order. And I understand what David is trying to  
3 accomplish here, and Grace is trying to accomplish. But the  
4 x-ray order provided several alternative routes. Number one,  
5 you provide -- you can provide a copy, but you've got to have a  
6 certification. And the certification has to be basically  
7 pursuant to the court order, has to show that the x-rays is the  
8 same in essence as the original. The alternative was, if we  
9 couldn't get the certification, we would tell Grace and let  
10 them know, and they could come out to the firms to inspect  
11 their x-rays.

12           As starters, this whole procedure -- as the whole  
13 questionnaire is very unusual procedurally, we think it's  
14 probably improper. Nevertheless, we've tried to comply and  
15 give the Court what it needs to make an estimation. It's  
16 proven very difficult by some firms to get the certification  
17 that is acceptable to Grace. In some cases, certifications  
18 have been received, and they're not acceptable to Grace. In  
19 that instance, there's really only one thing that we could do.  
20 We've run into other problems that were more or less  
21 predictable.

22           And that's -- we've got situations where the firms do  
23 not have the x-rays, and they're with the hospitals. In some  
24 cases, the hospitals will not release it unless certain  
25 administrative and other fees are paid by the person seeking to

1 get -- release of the x-ray, and in particular the Angelos firm  
2 which I believe was the largest -- the largest number of x-rays  
3 of any of the firms involved in lung cancer cases.

4           We informed Grace of this. We informed them of the  
5 charges, and Grace refused to pay. And it's certainly in our  
6 view improper if Grace is seeking the x-rays for us to have to  
7 pay that cost which is a pure third party cost. And I think if  
8 nothing else was contemplated by the order -- so, first of all,  
9 I'd like to say, we have complied with the order to the letter  
10 and the spirit of the order. We have tried to get the  
11 certifications where we can. Where we can't, we've told Grace  
12 to come and get it. And there's another category where the  
13 x-rays are with third parties, and we're trying to get them.  
14 And in some cases, there are costs that Grace has refused to  
15 pay.

16           Now, having said all that, I understand the problem  
17 that David Bernick described to the Court. And if in fact the  
18 Court is interested in having a facilities set up for which the  
19 original x-rays can be sent, it would seem to me that Grace  
20 would not only have to pay for the rent of that facility, but  
21 the manning of the facility, and the administrative charges,  
22 and any other charge that would be incurred.

23           And if I also understand it, the x-rays including  
24 transportation of the x-rays -- as I understand it, they would  
25 only need those -- that for 30 day. We're still going to run

1 into certain circumstances where it's impossible to get the  
2 x-rays out of doctors' offices, hospitals, et cetera, without  
3 fees and charges. Clearly, I think Grace needs to pay those.

4           With regard to the second alternative, I'll let Nate  
5 Finch speak to that. But it seems to me that we would oppose  
6 that. Well, of course. And I'm not going to address it, I'll  
7 let Nate address it. But the first alternative, I don't know  
8 that it's necessarily acceptable. I haven't passed it by my  
9 clients. Looking over the list of where people are located  
10 -- and frankly it seems to me that Chicago is not a place where  
11 you've got the top law firms with numbers of x-rays. It would  
12 seem to me that it might be more California than Chicago. But  
13 I'm not going to fuss about that. I think Greg Purcell has a  
14 fair amount of x-rays that -- and they're out there in San  
15 Francisco.

16           But be that is at it may, I just want to make sure  
17 that the Court understands, number one, this was a highly  
18 unusual procedure. Two, we've got an agreed order which was  
19 agreed to by Grace, agreed to by the claimants which the  
20 claimants have fully complied with. Three, I understand  
21 Grace's problem. I don't think Grace has fully understood our  
22 problems in getting these x-rays. And I certainly want to work  
23 with the Court and work with Grace to try and solve the issues.  
24 But in many respects, we view this is as a problem of Grace's  
25 making, not of the claimants making.

1 I'll let -- I'll turn over the floor to either Nate  
2 or Natalie.

3 THE COURT: Okay. I'm not sure who wants to go next,  
4 Mr. Finch?

5 MR. FINCH: This is Nathan Finch on behalf of the  
6 Asbestos Claimant Committee. First of all, I think the Court  
7 should bear in mind that the central legal issue is the  
8 possession, custody, and control of the x-rays. And the Court  
9 has already, correctly in my view, ruled that the federal and  
10 civil procedure do not require a party to turn over original  
11 materials to the custody and control of their opponent, or  
12 indeed to the custody and control of anyone else.

13 And the reason it was written like that is in many  
14 instances, there would -- there could be chain of custody-type  
15 issues. And particularly when you're trying to get 5,000  
16 x-rays sent from around the country, even just to three  
17 repositories -- there are many people who have expressed  
18 concerns, you know, what happens if the x-rays get to the  
19 repository and somebody looks at Mr. Smith's x-rays and puts  
20 them back in the jacket for Mr. Jones, and they're in the  
21 incorrect jacket, how am I going to prove the chain of custody  
22 as -- you know, first of all that would undermine Mr. Smith or  
23 Mr. Jones' claims? And then how would you prove up the chain  
24 of custody? I mean, the custody issues alone, I think,  
25 preclude doing what Mr. Bernick's first suggestion.

1 And the second thing I think the Court should bear in  
2 mind is that there has been absolute compliance with the  
3 Court's order. If you read the materials that the debtor  
4 submitted, they most helpfully fail to include the Court's  
5 December 22nd, 2006 x-ray order. And I suggest to Your Honor  
6 that if you read that order, particularly Paragraphs 2 and  
7 Paragraph 3 in conjunction, and then read the correspondence  
8 that the debtor attached to -- I think -- three to its papers,  
9 you will see that people have done a variety of things to  
10 comply with the order. They have either -- in some instances  
11 sent original x-rays to Rust, in other instances they have sent  
12 certified x-rays that Grace finds acceptable.

13 In many instances, and this is what Grace is  
14 complaining of, they have said, it is not possible or  
15 reasonably practical for us to certify this. And they've gone  
16 on to explain medical reasons why they couldn't get the  
17 certification. And it's not a one size fits all solution here.  
18 Some places in the country where apparently there are x-ray  
19 copying facilities and doctors willing to make the  
20 certification, there are many others that aren't. And that's  
21 what Your Honor's order envisioned. And Grace agreed to that  
22 order.

23 So, I think that what they're doing is, they're  
24 coming in and saying, this is an emergency, Your Honor. You  
25 have to -- we haven't had -- we don't have the time to go

1 around and look at all these x-rays that we, Grace, has  
2 requested. You have to modify the order that in fact we agreed  
3 to. And I think that is improper. And I think it flies in the  
4 face of the federal rules of civil procedure. And I also think  
5 that is a problem of Grace's own making.

6 My third point, the latest of Mr. Bernick's second  
7 suggestion which is, well, the Court can just enter an order  
8 that says if there's no copy or no original, the x-ray is  
9 deemed not to provide evidence of asbestos-related disease or  
10 the copy is deemed to be identical for estimation purposes.  
11 Effectively, what he's asking is the Court to make a factual  
12 finding on an issue that may well be disputed by the ACC of the  
13 Future Claimants Representative without any proof. And I  
14 would, you know, heatedly oppose that.

15 At one point in time, the x-ray was reviewed by  
16 somebody for the claimant. And that person stated that there  
17 were interstitial fibrosis and/or pleural plaques. The fact  
18 that the x-ray may or may not be readily retrievable on Grace's  
19 time-line, it says nothing about what it proves that trial with  
20 the claimant would have.

21 And once again, Mr. Bernick reminds the Court this is  
22 an estimation proceeding and not an individual claims allowance  
23 proceeding. But were it a claims allowance proceeding, there  
24 may well be proof that's very different from whatever x-ray  
25 people had access to at the time that Grace went into

1 bankruptcy. And therefore, I think asking effectively the  
2 Asbestos Claims Committee and the Future Claimants  
3 Representative to be bound by some kind of factual finding of  
4 the Court or a stipulation or fact that may not be true, isn't  
5 -- is simply improper.

6 And my bottom line, Your Honor, this is an order that  
7 the Court's got it absolutely right on an key legal issue which  
8 is who has the right to require custody (indiscernible) and the  
9 rules lay that with the party who has the document.

10 Grace agreed to an order following the December 5th  
11 hearing. If Grace truly felt these x-rays were critical to  
12 this case, it could have started asking for them months if not  
13 years prior to October of 2006 when they first -- first sent  
14 any kind of a letter to anybody asking for an x-ray, they could  
15 have reviewed them by now.

16 So, for all these reasons, I respectfully urge the  
17 Court to deny Grace's motion to modify the order they'd agreed  
18 to and instruct people just to follow the rules. With that I  
19 turn the floor over to Natalie Ramsey.

20 THE COURT: Ms. Ramsey?

21 MS. RAMSEY: Good afternoon, Your Honor, Natalie  
22 Ramsey for the MMWR firm. Your Honor to reiterate a couple of  
23 points and then to make a couple of additional ones. First of  
24 all as Mr. Esserman and Mr. Finch indicated, the x-ray order  
25 was drafted by the parties, by the debtor's representatives and

1 by representatives of the asbestos claimants to be in  
2 accordance with the Court's order and direction of December 5th  
3 hearing. And at that hearing, the Court did find that the  
4 federal rules, specifically 34 and 26, did not require us to  
5 relinquish control of this vital and irreplaceable piece of  
6 evidence. And with respect to its state, it is truly  
7 irreplaceable.

8           And after that hearing, the parties sat down and  
9 negotiated. In that negotiation, it was specifically  
10 contemplated that there would be circumstances where either the  
11 copies or certifications could not be obtained and where  
12 originals would be made available by the firm at their office.  
13 Jointly, this was submitted under the debtor's certification,  
14 and was entered by the Court. That was roughly a month or so  
15 ago.

16           During that period of time, the firms that I  
17 represent, the MMWR firm have complied absolutely with the  
18 letter and spirit of this order. And so, when we're now faced  
19 with this motion which seeks broad based relief against unnamed  
20 claimants who haven't complied, we find ourselves, both  
21 -- feeling that the order -- that motion is filed in bad faith  
22 and also finding that it is impossible to handle this without  
23 specific circumstances and specific plans.

24           The debtor has created a chart which we know he has  
25 provided to the Court. I don't know if the Court has had an

1 opportunity to review it. But in the chart -- the debtor  
2 identifies the chart filed today. The debtor identifies four  
3 of the MMWR firms that it says has sent acceptable  
4 certifications along with x-rays. And then it divides  
5 additional firms into pockets of non-compliance or -- either by  
6 reason of failing to have fully submitted x-rays or failing to  
7 provide acceptable certification.

8           As I indicated to the Court in the last omnibus, in  
9 two of these instances, the certification that was provided by  
10 the MMWR firm -- that there's one of them that's attached to  
11 our response -- specifically says that the firms believe them  
12 to be accurate reproductions of the original, do not have any  
13 reason to believe that they're not, but simply they're not able  
14 to say that they are because they don't have possession of the  
15 original (indiscernible). That's one set of circumstances.

16           In other sets of circumstances, the firms that  
17 certified that they have made good faith effort to obtain  
18 copies and that they are working on that, but that they don't  
19 know whether they're going to be -- you know, they don't know  
20 the time-frame for doing that. In some instances, they've  
21 already received them and have sent them in even after sending  
22 those letters. And in some instances, we have not yet received  
23 copies. We're trying to get certification at the same time.

24           So, there are a number of different facts that go  
25 -- that are reflected in the allegations of non-compliance.

1 And in some instances, we would take the position that the  
2 allegation that the certification is not acceptable is also  
3 just not correct and does not form the basis for the Court  
4 being asked to reverse a decision that it made after extensive  
5 briefing and argument not that long ago.

6 And I would finally reiterate two other points, one  
7 is that in many instances, it's reflected by the information  
8 that Grace has provided itself to the Court, Grace has been  
9 aware of these issues since January 11 or 12. And in that  
10 time, it has failed utterly to attempt to contact us and reach  
11 out to us to work these situations out. And in some instances,  
12 there are solutions that could have been reached out -- in some  
13 instances, the firms are willing to make available originals.  
14 Some of the firms -- some of the firms are not willing to do  
15 that, but they're willing to work with the debtor to accomplish  
16 or satisfy the debtor in other ways.

17 We have not had that opportunity before the filing of  
18 the debtor's motion. And finally, I would reiterate the final  
19 point that Mr. Finch made that the debtor's delay should not be  
20 our emergency.

21 THE COURT: I'm sorry, the debtor's what? I  
22 couldn't --

23 MS. RAMSEY: Delay in --

24 THE COURT: Delay?

25 MS. RAMSEY: -- delay in seeking these x-rays should

1 not be the emergency of the asbestos --

2 THE COURT: Okay. Anyone else wish to speak in  
3 opposition to this motion? Okay, Mr. Bernick?

4 MR. BERNICK: Yes, I'll try to be brief. I hoped  
5 that we wouldn't go back over the history, but the history  
6 obviously is the whole reason why we're here. And we have a  
7 very, very different view of it as the Court I'm sure will  
8 recall, and that is that beginning in October, we asked for  
9 these things. And we knew that there was going to be some  
10 discussion about it. Albeit our initial contact with Mr.  
11 Esserman and with others suggested that it would probably be  
12 something that could be worked out.

13 Because we're concerned about timing, we made a  
14 specific effort to have this issue considered in connection  
15 with the December 5 hearing, remember the hearing on the motion  
16 to compel. Because at that point, everybody was focused on  
17 getting their particular issues resolved in a timely fashion.  
18 The asbestos claimants wanted Your Honor to consider right up  
19 front the question of the admissibility and discoverability of  
20 settlement evidence. We wanted to get final resolution of the  
21 question of what the questionnaires would have to say, and the  
22 timing for submission of those questionnaires.

23 And therefore, we took specific efforts to assure  
24 that this issue that is access to the x-rays which is  
25 (indiscernible) and the questionnaires all along, albeit Your

1 Honor will recall, we can reach closure on the questionnaire  
2 because we litigated through two rounds until the late summer  
3 of last year. So, we wanted to raise this issue. We did raise  
4 that issue. I remember still today being in court with Your  
5 Honor with the other side -- a number of issues did get raised  
6 again. And we received assurances that this thing could be  
7 worked out. I believe Mr. Esserman was participating  
8 telephonically and indicated that this would not be a problem.

9           It was I who raised this question again, I believe it  
10 was on the 19th of December but it was before Your Honor issued  
11 the -- signed off on the agreed order, because I was concerned  
12 that the fact that this was going to be a problem and that we  
13 were going to have to look -- that we were not going to get  
14 access to all the originals because notwithstanding the fact  
15 that these assurances had been provided informally that we're  
16 just not going to get compliance.

17           And I specifically raised this matter. Your Honor  
18 was a little bit impatient with me, and I have the transcript  
19 page, Page 14 where Your Honor said, "This is really wasting my  
20 time. I really have other things to do. The copies are the  
21 same -- are to be transmitted unless the copies for some reason  
22 or other are not certified as accurate, you're not even getting  
23 into this issue about the originals if you get copies and  
24 you're really wasting a lot of time. If something has a  
25 legitimate reason why an original can't be provided in lieu of

1 a copy, they're going to give you a certification. If you have  
2 some challenge to it, then file a motion and we'll deal with  
3 it. You know this process is the -- supposed to be the  
4 exception, not the rule." And that fact and that statement  
5 -- and that has (indiscernible) with absolutely of the  
6 evidence. There was no -- there'll no point in force to an  
7 order that provided for the submission of copies that were to  
8 be certified, and certified precisely. And at the end of the  
9 day, everybody was going to come back if essentially they have  
10 -- with -- you know is a minority exception and say, they  
11 couldn't do it, and therefore, we have to go back to the idea  
12 of looking at original of the offices'.

13 That's what they started out. They started out with  
14 the originals of the offices', that's why we went back. We  
15 went over this whole thing to begin with is to establish not  
16 going to be sufficient.

17 So, when everybody says that this order was agreed,  
18 it absolutely was agreed. If pursuant -- it was agreed  
19 pursuant to the statement that Your Honor made in December that  
20 this would be an exceptional circumstance. That is why it was  
21 agreed. If it were to be in fact the rule rather than the  
22 exception, the order provided absolutely no relief whatsoever.

23 So, that order is something that we had hoped would  
24 work because Your Honor could not have been clearer in December  
25 what would take place. And in fact, what's happened is that

1 it's not worked. And I'm not making any allegations of bad  
2 faith or suggestions of bad faith, but this is not a problem of  
3 Grace's creation. This is a problem in part having entered  
4 into an order where people did not in fact do what Your Honor  
5 suggested was going to be the rule that you utilize the  
6 exception and swallow the rule.

7           Now then the question is well, what are the concrete  
8 factual circumstances that lead to non-compliance with the  
9 order? Well, there are two statements that have been made.  
10 One is that people have provided acceptable certifications and  
11 somehow we've been we've been resistant to that, that is  
12 absolutely and completely incorrect. What we have is the  
13 people generally say they cannot provide any certification.

14           And I'll pick out the Wartnick firm because I think  
15 that Natalie was referring to this firm because the language is  
16 very constructive. It says, "We have no reason to believe that  
17 the x-rays" -- this is what the Wartnick firm says -- "we are  
18 submitting are not representative of the original and believe  
19 them to be representative of the original." That's very  
20 carefully stated.

21           We're not talking about representative. We're  
22 talking about whether they are identical to the original.  
23 That's the whole idea of having a copy is that it is not an  
24 approximation. So, they say there's no reason to believe  
25 they're not representative, but they go on to say, "We are

1 unable to certify that these copies are identical to the  
2 originals as we don't have the originals."

3 Well, at that point, we don't have satisfaction of  
4 the evidentiary predicate for using the copies, that doesn't do  
5 us any good. The certification has to be that the copy is the  
6 same as the original, otherwise, we've accomplished zero. It's  
7 not admissible in place of the original. People, when they  
8 sent (indiscernible) are for all their testimony is predicated  
9 on the fact what they may say is disputed. So, it undercuts  
10 the entire purpose of the order.

11 We haven't been unreasonable on this. The order  
12 specifically called out that there had to be identity. You  
13 said -- what Your Honor said was that's what the rules require.  
14 We're not blaming people for anything -- failing to provide  
15 that certification. The fact of the matter is however, that  
16 their certification is not there.

17 We then get to the second circumstance where people  
18 say they don't have the x-ray, that it's going to cost -- it's  
19 going to cost them to get it, and that we've not been prepared  
20 to kind of work this out.

21 We've had to prepare to work it out. We had to be  
22 prepared to work it out on a basis that actually put these x-  
23 rays in a location where they're useful for us, not in  
24 somebody's law offices. Then you have to take the cost of  
25 somehow transporting them and handling them, fees of the

1 hospital would not only be unreasonable, it is not called for  
2 in any procedure that I'm aware of. If the originals need to  
3 be examined, it's the duty of the party that's relying upon the  
4 original as opposed to the copy in making the claim to make  
5 that original available.

6 And can you imagine the administrative problem that  
7 we would get into if we took on the task of monitoring the  
8 costs that are associated with bringing the originals to a  
9 certain location? It makes absolutely no sense, and again, was  
10 not provided in the order because we would never have agreed to  
11 it in the context of the order.

12 So, we don't have too much choice here. We can't get  
13 people to certify the copies. We can't get them to make the  
14 originals available to us on a reasonable basis. And  
15 therefore, we come back here.

16 Now, on the question of whether a repository somehow  
17 violates the rules of evidence, that is again false. The rules  
18 of evidence do not preclude the Court from making orders that  
19 say -- or will supercede your -- make the -- not -- for the  
20 Court for making an order that says, if there's the originals  
21 that alone are what we have to work with in the case, the  
22 originals can't be transported. That's just wrong. If the  
23 originals are the evidence in the case, the Court can order  
24 that they may be transported in any way, that it's important to  
25 the prosecution of the case.

1 I've been involved in several cases where Courts have  
2 issued orders that for purposes of adjudicating issue that  
3 turns on the originals, the originals are actually filed with  
4 the Court or maintained in the custody of the Court, including  
5 hard, you know, pieces of material evidence in construction  
6 cases, in the San Juan Dupont Plaza case, the Court ordered  
7 that all originals, all demonstratives -- everything, be in the  
8 depository in San Juan, Puerto Rico for purposes of the trial  
9 at the party's expense. They don't want to do that, but  
10 there's nothing that says the Court can't make that order.

11 Effectively, what's being said here is that, yes, our  
12 claim's depend in part on the originals, but we can't make the  
13 originals available to you because -- if not provided for in  
14 the rules. And therefore, you can't have the appropriate  
15 access to them that your experts need, so, we're just going to  
16 keep them.

17 Now, they're not saying, oh, well, gee, there really  
18 is an issue about whether the copies are true copies or not.  
19 They're saying, they don't believe that there's an issue. Got  
20 to have it one way or the other. If the originals are going to  
21 be the evidence, they have to be reasonably available to the  
22 other side so that they can be -- so that we can prepare our  
23 case. If they're not, then they shouldn't be saying that the  
24 originals somehow are going to be the originals that they'll  
25 produce at trial. You can't have it at trial and not at

1 discovery.

2 Which then brings me to what I think was a reasonable  
3 proposal for how to deal with this. We have the problem of  
4 the provision of the x-ray, but not the certification. If  
5 people can't certify today that the x-ray is an accurate copy,  
6 then all we're saying is that they can't later contest that it  
7 is an accurate copy.

8 Whatever the situation is going to be when the  
9 estimation comes to trial should apply today. So, if it is a  
10 copy that they don't believe is not identical, and they're not  
11 going to later on that it's not identical, then I don't see  
12 what the problem is with saying that -- the Court saying that  
13 for purposes of the estimation, it could be considered to be  
14 identical.

15 THE COURT: Frankly, I don't see a problem with that  
16 for the estimation purpose either, provided that that's what  
17 it's limited to. If people are saying that we'll give you a  
18 copy, we don't have any reason to believe that it's not the  
19 same as the original. But if for whatever reason, we can't  
20 produce a certification to that effect, well -- you know, for  
21 whatever reason, I understand that there are some -- either  
22 doctors or lawyers or witnesses who would feel uncomfortable  
23 making the certification for whatever the reasons are.  
24 Nonetheless, to the extent that a copy is what is going to be  
25 produced -- or used by Grace in the estimation proceeding in

1 lieu of the original.

2 I also agree with you that if they're going to say,  
3 here's a copy, and we agree that for estimation purposes, this  
4 is -- I'll use my words "as good as the original" -- then I  
5 think you're quite correct, Mr. Bernick, that probably should  
6 do it for estimation purposes. And that's not to say that for  
7 actual litigation on the merits of the claims, that there can't  
8 be a different ruling or a different analysis when someone is  
9 looking at the specific original and tying it to the proof of  
10 claims. But for estimation purposes, I really don't see where  
11 anybody would be prejudiced by that. This -- I think the order  
12 is intended to get everybody on to the same page so that you're  
13 all looking at the same data set.

14 And if the same data set is going to include a copy  
15 -- I think I was the one who insisted that the copies had to be  
16 served by -- because I think it's important to make sure that  
17 we're looking at the same data set. But if people are not  
18 going to contest that data set, then that's fine. But I agree  
19 that all parties are entitled to know that no one is going to  
20 contest that data set. So, if you're not going to contest it,  
21 I agree. If the x-ray is a copy and all parties agree that for  
22 estimation purposes, the copy can be used in lieu of an  
23 original, I think that's probably all you need.

24 With respect to the second part, however, of your  
25 order that if the x-ray does exist and can't be produced, that

1 that means that there is no evidence of lung disease that is  
2 tied to asbestos, I don't know that I could go there.

3 MR. BERNICK: Well, I'll make -- let me -- let me  
4 really make sure I gave clear -- I wouldn't advocate that.  
5 What I'm saying is that if they're not going to provide the  
6 certified copy, and they want to use -- I'm sorry, if they're  
7 not going to provide the certified copy, then they at that  
8 point -- we don't have any basis for being able to ascertain  
9 whether the original was properly read. And --

10 THE COURT: Yes, you do, you could go look at the  
11 originals.

12 MR. BERNICK: No -- well, but that -- okay, that then  
13 gets back to the question that again is going to swallow --

14 THE COURT: But that's your choice. I mean, you and  
15 your clients have decided the method by which you choose to do  
16 this estimation hearing. And there are costs involved in  
17 discovery. If you've chosen the method of doing discovery,  
18 this happens to be an expensive method, that's your choice. I  
19 don't think that's up to the parties to bear that expense. I  
20 don't like to see the estate using a lot of dollars in a  
21 fashion that isn't going to be productive. But nonetheless,  
22 that's still your choice. So, to the extent that you have a  
23 contest about a specific x-ray, you've got access to the  
24 originals. And I think you just have to go look at the  
25 originals. But with respect to this copy issue, it seems to me

1 that if the parties are going to say, here's a copy, you know,  
2 we agree you can use it in lieu of an original, maybe that's  
3 the long and short of the major problems that both the debtor  
4 and frankly the parties face.

5 MR. BERNICK: Well, the difficulty, Your Honor, I  
6 think if you -- if you kind of part through how that will be  
7 treated is that if people still have the latitude as this order  
8 now provides them, not to provide the copy -- not to provide  
9 the certification that say, we intend to rely upon the  
10 originals, that --

11 THE COURT: No, no. No, I don't think that's the  
12 issue. I thought that there were certain firms who have  
13 already notified you that for one reason or another an original  
14 is not available.

15 MR. BERNICK: But if that is true that if the  
16 original no longer exists, then I guess we have to be satisfied  
17 with the copy. And then again, it seems to me that we're back  
18 to your first principle which I believe is correct, that there  
19 should not be an issue about the accuracy of the copy. So,  
20 I --

21 THE COURT: For purposes of estimation.

22 MR. BERNICK: For purposes of estimation which really  
23 (indiscernible) that if there is an original, certainly a copy  
24 could be furnished. If there is not an original, there is a  
25 copy, and the original no longer exists, then the copy again

1 should be usable without there being an issue about its  
2 accuracy because it's the only thing that's there. If there's  
3 nothing, there's no longer an original or there's no longer a  
4 copy, and all that's there in the record is the prior  
5 assessment by whatever doctor it is who looked at it, well, I  
6 can't make them produce something that's not there. And the  
7 Court can't either. And we'll just have to deal with that as a  
8 category of cases.

9 But if there's an original that exists or a copy that  
10 exists, then it seems to me that they either -- they either say  
11 that it's an accurate copy, get an accurate copy, or the Court  
12 orders that whatever the copy is, is an accurate copy. It  
13 shouldn't be up to us to go look at the original. We don't  
14 want to look at the original. We don't care about looking at  
15 the original.

16 MR. FINCH: Your Honor, may I be heard on this.

17 THE COURT: Yes, yes.

18 MR. FINCH: This is Nathan Finch for the asbestos  
19 claimant. Mr. Bernick is stating three very different  
20 situations.

21 THE COURT: Yes, I think he is.

22 MR. FINCH: One situation is where people say, we  
23 have a copy. We have no reason to believe that it's not the  
24 same as the original. We don't have the original. In that  
25 circumstance, we're willing to say that this is what we would

1 -- this is what the x-ray that we have is. In that  
2 circumstance, there is probably no harm in an order that says,  
3 if the firm is willing to -- think that it believes the copy to  
4 be the same as the original, that's one circumstance. But --

5 UNIDENTIFIED ATTORNEY: Excuse me, Your Honor, we  
6 can't hear Mr. Finch.

7 MR. FINCH: The -- can you hear me now?

8 THE COURT: Yes. Are you on a speaker phone, Mr.  
9 Finch.

10 MR. FINCH: No, I'm not. Can you hear me, Your  
11 Honor?

12 THE COURT: I can hear you fine. But they  
13 -- apparently, they can't in the courtroom. Can you get him  
14 now, Jan?

15 THE CLERK: Yes.

16 THE COURT: Okay, go ahead, Mr. Finch.

17 MR. FINCH: The second situation, however, is where  
18 the law firm has the original in its possession. And they are  
19 unable to make a copy of the x-ray and have anyone certify that  
20 the x-ray is identical to the original. That's a very  
21 different circumstance. And neither -- the ACC nor the  
22 claimant be willing to certify that whatever copy is that  
23 result from that is identical in all material respect to the  
24 original if the claimant's doctor or the claimant's copying  
25 facility is unwilling to do that.

1 THE COURT: No, I think the issue for the second one,  
2 Mr. Finch, is if that's the copy that you're giving to the  
3 debtor to rely on for purposes of estimation, that you won't  
4 later come back and say, that's not an accurate copy for  
5 estimation purposes. Whatever you produce to the debtor is  
6 what -- or whoever produces to the debtor -- as the evidence of  
7 the lung cancer should be what the debtor is entitled to rely  
8 on for purposes of estimation.

9 MR. FINCH: But if the response is, we have an  
10 original, we can't get a copy, the debtor is free to come look  
11 at the original, that should be sufficient, Your Honor.

12 THE COURT: But there isn't any reason if they have  
13 an original that they can't get a copy. They may not be able  
14 to get a certification, but they ought to be able to get a  
15 copy.

16 MR. FINCH: But then you are basically making a  
17 finding of fact that is -- that the -- that the -- because the  
18 reason the people are having difficulty getting certification  
19 as I understand it, is people -- their B-readers or their  
20 doctors are saying that, you know, I can't say that what is on  
21 the copy is identical to what's on the original. And I very  
22 well would like perhaps the right to send one of my doctors go  
23 look at the original. Because if the copy is submitted by the  
24 law firm, and they say, we can't say anything about this, what  
25 Your Honor is effectively doing, is making a finding of fact

1 about a fact that may not be true and may well be in dispute.

2 THE COURT: Well, that's why -- I guess why I'm lost  
3 is that -- maybe I'm not lost. Maybe what you're saying is,  
4 people who -- well, let me start -- I guess maybe the problem  
5 is my fundamental lack of understanding as to why you can't get  
6 a copy of the x-ray that is -- that is reflective of what the  
7 original is.

8 MR. BERNICK: Your Honor, maybe I can help with that  
9 a little bit. And I'll say something that is, you know, not  
10 necessarily the most useful thing for my position. We believe  
11 it's possible to get good and accurate copies. And the copies  
12 are sufficient.

13 But we recognize that there may be doctors who for  
14 whatever reason will take the position that the copy is not  
15 quite as accurate as the original when it comes to looking for  
16 what these B-readers look for. They're looking for things that  
17 are, you know, opacities. There are features of the x-ray, and  
18 their it's their expert judgment on whether they see it or not.  
19 Now, we again -- there's a whole discussion there about whether  
20 they should therefore be read once, or twice, or three times by  
21 somebody who is objective, but that's for another day.

22 I could see that there maybe some expert who says,  
23 well, I don't know that the copy is necessarily identical to  
24 the original. I entertain that as a possibility.

25 Our position here, therefore, is that they either

1 give us the original in someway that we realistically can get  
2 it read. If that's going to be their position that their  
3 experts are going to think, no, there's no copy that I can  
4 certify as being original, and you've got to have the original,  
5 then and only then do we believe that it's important to have  
6 that x-ray made available to us as presumably it will be made  
7 available at the estimation itself, that x-ray made available  
8 to us on a reasonable basis.

9           If however, they believe that it is possible to have  
10 a copy, then the copy is fine with us if it's fine with them.  
11 But you can't have it -- they say it's only the original that  
12 is sufficient, but it's we that don't have the ability as a  
13 practical matter to review that original given the time frame  
14 that we have.

15           We're not asking for the Court to make any finding of  
16 fact whatsoever. It's not a question of making any finding.  
17 It's not something that would be in any way, shape, or form,  
18 binding with respect to some future proceeding. We're asking  
19 that Your Honor say as you did that copies are going to be the  
20 way to go, that copies will be taped or it could be supplied by  
21 the claimants here so that they are as good as they can be.  
22 That is the data set that we're going to work with. And that  
23 we're not going to have issues about whether the copy is as  
24 opposed to the original.

25           THE COURT: Well, I can't make that statement if the

1 other parties aren't willing to go along with it.

2 MR. BERNICK: Well, but --

3 THE COURT: You can do it by way of stipulation. It  
4 seems to me the you'll be saving a lot of cost and expense for  
5 everyone. But if you can't, and the parties aren't willing to  
6 do it, then I think your choice is to go look at the originals.  
7 And I think, unfortunately, the cost of the -- can and should  
8 reside with the entity that's entitled to them.

9 Now, like you Mr. Bernick, I've been in trials where  
10 the Court ordered that all original evidence be brought to  
11 Court. So, if you want to lodge it with the Court, I suppose,  
12 I can make that order.

13 MR. BERNICK: Well, then --

14 THE COURT: I can order the original to be produced  
15 and kept in the registry of the Court.

16 UNIDENTIFIED ATTORNEY: Your Honor --

17 MR. BERNICK: Well, it's just -- before we get a  
18 further response to that, that is then exactly what we will do.  
19 We will -- we will work with -- we'll simply submit an order.  
20 We will work with Your Honor's chambers to set up an area in  
21 Pittsburgh which is subject to whatever security is necessary.  
22 We'll pay for the rent, we'll pay for personnel to be there.  
23 And we will then ask, does any and all originals that will  
24 actually be relied upon for purposes of the estimation; that  
25 is, original x-rays be put in there.

1           It's just that -- it's just that simple because we  
2 don't -- we do not have -- it's a practical matter, it's not a  
3 question of expense, Your Honor. We have three different sets  
4 of experts to review these because we believe that they  
5 according to the methodology as it's spelled out in the  
6 B-reading protocol, requires repetition reading. It has to be  
7 replicated.

8           So, literally, we would have to have a team of three  
9 experts travel around to 39 different cities so they can all  
10 sit there and wait 'til one has read it, then another to read  
11 it, then another to read it. This is not -- this is not  
12 feasible. We're not trying to force anything here. We're  
13 trying to get access to the original evidence that they  
14 apparently say is the only evidence that's reliable.

15           So, it's one way or the other. We either -- we  
16 either, you know, have to create the depository or we don't get  
17 access to the information.

18           MR. FINCH: Your Honor, may I respond to that please?  
19 Let's go back to first principles. This is a contested matter  
20 in a bankruptcy case where the debtor has on file a plan that  
21 has an implied asbestos liability estimate in it. And Your  
22 Honor is holding this hearing for purposes of determining in  
23 part whether that plan is confirmable. No individual asbestos  
24 claimant or even groups of asbestos claimants are going to be  
25 putting on an individual case, at all. None of them, Your

1 Honor -- and the debtor has repeatedly said this isn't for  
2 purposes of individual case valuation or individual case  
3 allowance or disallowance or individual case trials. There  
4 will not be a single x-ray put forward by the Asbestos  
5 Claimants Committee or the Future Claimants Representative.  
6 The only parties who are litigating the magnitude of the  
7 debtors' (indiscernible) liability with the debtor in the  
8 estimation proceeding.

9           The way this is going to come up is the debtor will  
10 put on an expert that says -- or three experts or some  
11 combination of that -- and they'll say, we have looked at 3,000  
12 individual x-rays. And in our opinion, only 22 percent of them  
13 show evidence of interstitial pulmonary fibrosis consistent  
14 with asbestosis. And another 18 percent of them show pleural  
15 plaques.

16           Well, my client would be entitled to rebut that. And  
17 one way to rebut that is to put on a -- first of all, we put on  
18 testimony that you don't need underlying interstitial fibrosis  
19 or evidence of pleural plaques in order to have  
20 asbestos-related lung cancer. And the medical literature is  
21 clear about that. But another way to rebut that is to put on a  
22 doctor that says, I have looked at the same 2,000 x-rays that  
23 the debtor's experts have looked at, and in my opinion, it's a  
24 higher percent of -- that show interstitial fibrosis or pleural  
25 plaques. And the debtor's x-rays -- the debtor's experts are

1 looking at copies.

2 I actually went back and looked at some of the  
3 originals. And in some instances the originals were better and  
4 showed more stuff than the copies did. That's what I -- if you  
5 enter this order, I and the Future's Rep would be precluded  
6 from doing. And the --

7 THE COURT: No, you won't because the originals are  
8 in the custody of the Court, everybody can have access to the  
9 custody in court.

10 MR. FINCH: But --

11 THE COURT: That probably makes the most sense  
12 because then originals are there for everyone. And at the end  
13 of the court proceeding, or as needed in the -- to the extent  
14 that the individual plaintiffs need their x-rays back for  
15 whatever reason as the trials goes on, they can get them back  
16 out of the court registry.

17 MR. FINCH: Your Honor, I don't think the Court  
18 -- the case that Mr. Bernick was talking about the Court  
19 requiring original evidence be put in the repository, talking  
20 about original trial exhibits. This is basically the Court  
21 creating a repository for discovery. And I don't think the  
22 federal, civil procedure permit that or allow for it. They  
23 talk about producing for inspection and copying, not turning  
24 over possession to the Court. And --

25 THE COURT: Well, I'm assuming that Mr. Bernick is

1 talking about using these as original trial evidence.

2 MR. BERNICK: That's right. I mean if Mr. Finch  
3 opposes it, his experts are going to use the fact that they had  
4 access to the original. It basically undercuts the testimony  
5 of our experts and we will not have the opportunity to have our  
6 experts be in the same position that they are in because they  
7 will not have had access to the originals.

8 MR. FINCH: But they absolutely have access to the  
9 -- Judge, Your Honor.

10 MR. BERNICK: I'm sorry, as a practical matter --

11 THE COURT: No, Mr. Bernick, they have the same  
12 access. The debtor has the same -- exact same rights to go  
13 look at these original x-rays anywhere else as the Asbestos  
14 Committees' experts and everyone else's experts do. The  
15 reality is the debtor just doesn't want to do it this way. I  
16 mean that's what the bottom line is, the debtor just doesn't  
17 want to make the dog and pony show of having three experts  
18 travel around the 39 cities.

19 MR. BERNICK: We'll do whatever it is that Your Honor  
20 believes we are entitled to do. We will go -- we will have our  
21 experts troop around and do this. And it will take a long  
22 time.

23 THE COURT: Well --

24 MR. BERNICK: It just will. I mean there's nothing  
25 else that I can -- I can do about it. I have tried, Your

1 Honor, for four or five months now. We have -- my client has  
2 tried for two years to get access to the underlying data so  
3 that we are in the same position as the other side is and  
4 there's no hide the ball situation.

5 THE COURT: No, wait. Let's start -- I don't want to  
6 get into the pot calling the kettle black situation because  
7 it's going to dissolve into a he said, she said. And frankly,  
8 these discussions always dissolve into that and it's wholly  
9 unproductive.

10 MR. BERNICK: Right.

11 THE COURT: What you are searching for is evidence of  
12 x-rays from people who sued the debtor or had actions pending  
13 against the debtor before the bankruptcies were filed.

14 MR. BERNICK: Right.

15 THE COURT: So, this evidence has been out there and  
16 available for a very long time. It's not something new that  
17 has been newly created. It's been there.

18 MR. BERNICK: We --

19 THE COURT: -- to the extent that anybody needs it,  
20 it is available and has been available. The question is, how  
21 best to get into a format that anybody who wants to make use of  
22 it for purposes of discovery and trial --

23 Mr. Esserman, let's go back to you, you seem to have  
24 been able in some other instances to work through some of these  
25 things. What about the concept of either a temporary

1 repository, a you know, three repositories, wherever they need  
2 to be, or what about the concept that parties produce a copy,  
3 again at the expense of the debtor -- of the debtor -- but with  
4 the understanding that if a copy is going to be produced, that  
5 that is the copy that everyone will rely on for purposes of the  
6 estimation? That you know, if someone decides that they will  
7 not produce a copy, then everyone knows you have to go look at  
8 the original, and the original will be the evidence that people  
9 need to go look at.

10 But to give the plaintiff's counsel an opportunity to  
11 get copies because it can't be that all of these originals will  
12 be so suspect that B-readers will refuse to look at them saying  
13 that -- especially when somebody's already been diagnosed with  
14 lung cancer already -- the circumstance where we're looking at  
15 the least level of exposure to asbestos and most minimal  
16 asbestos in these level -- this is simply to -- whether or not  
17 the type of lung cancer is consistent with asbestos exposure.

18 So, I wouldn't think that most of these x-rays -- I  
19 wouldn't think -- I mean, again, I'm not a medical expert,  
20 maybe I'll be surprised, but I wouldn't suspect that most of  
21 these x-rays are going to be that open to question, are they?

22 MR. ESSERMAN: Well, Your Honor, this is Sander  
23 Esserman for the record. I think Your Honor's hit on a  
24 suggestion that maybe can work. And that is, what about  
25 something like this, that is that the plaintiff's law firms

1 where they've got access to the original, send the original out  
2 for copying.

3           And where they can't get the certification which they  
4 haven't been able to do, they just -- they just request and  
5 they certify that they have requested the copy service to make  
6 -- to make an identical copy. That way, you'd have the law  
7 firm's requesting from the copy service an identical copy. And  
8 the copy service -- to the extent -- we've tried to get  
9 certifications from some of them, and they're just -- they're  
10 just goofy about it because they're copy services, they're not  
11 in the business of making, you know, kind of specialized  
12 certifications here. That we do that where someone who wants  
13 to inspect the originals, that's all they have to do is give us  
14 notice and the firms will provide the originals. That seems to  
15 me to be the easiest way.

16           The second issue that I think we need to confront  
17 -- and that should get most of the -- most of the x-rays to  
18 Grace that are outstanding with at least a certification of  
19 reliability that the plaintiffs have sent it out for copying,  
20 and they've requested that the copy by equivalent to the  
21 original.

22           The second instance is where the plaintiffs don't  
23 have access to the original x-rays and there would -- some  
24 third party or third party repository where we're having  
25 difficulty getting that -- getting that without fees and

1 administrative fees. And I think that it's clear that Grace,  
2 number one, pay for those.

3 And number two, we then get those documents and we  
4 send them out for copies. We request that the copies be  
5 substantially or equivalent to the originals. And Grace has  
6 its evidence of this -- it wants to rely on. And to the extent  
7 they want to -- they want to look at originals at any one firm  
8 at any time, they just send us notice, like the order  
9 contemplated and they make arrangements to view it. We --

10 THE COURT: I think -- I think there's one piece  
11 that's missing, though, Mr. Esserman. And that is that the  
12 plaintiff firm who have sent the originals out for copying,  
13 asking that the copy be a duplicate of the original, an  
14 identical copy of the original, will then not somehow -- oh,  
15 but they won't be the parties in interest, it will be the ACC.  
16 That's the problem.

17 MR. FINCH: Well, Your Honor, this is Nathan Finch --

18 MR. BERNICK: Wait, wait, wait.

19 MR. FINCH: Actually, I was going to say, you might  
20 agree with me.

21 THE COURT: Go ahead, Mr. Finch.

22 MR. FINCH: I'm sorry, Your Honor.

23 THE COURT: Mr. Finch, go ahead.

24 MR. FINCH: I was going to say, I believe the ACC  
25 would be able to live with the kind of certification for

1 example that the Wartnick firm provided, which is that we have  
2 no reason to believe that this copy is not identical at all  
3 with material respect to the original. But we're not doctors  
4 and we can't -- we can't, you know, make the certification that  
5 the Court requires. That is something that I think I would not  
6 -- the ACC would not challenge.

7           It's a situation where people have an original and  
8 they can't get even a minimally acceptable copy. And that's  
9 where sort of the rubber hits the road, I guess what Mr.  
10 Bernick was seeking to address. And there I think we would  
11 have to be in a position to go and look at the originals as  
12 opposed to a copy that no nobody would even say, you know, we  
13 the law firm think is identical or at least is, we have no  
14 reason to believe that it's not identical to the original.

15           MR. BERNICK: But why -- let me -- let me --

16           THE COURT: Pardon me. Pardon me.

17           MR. BERNICK: Okay.

18           THE COURT: If we can get a certification from the  
19 firm that they have requested that the copy be an identical  
20 copy of the original, and then we can get a certification from  
21 the firm that they have received back a copy that they have no  
22 reason to believe that it is not a duplicate of the original  
23 based on the fact that they sent it out for that purpose, can  
24 we then get a stipulation from anybody who is going to appear  
25 at the estimation hearing that will indicate that this

1 documents -- or that the copies that were received with those  
2 certifications will be treated as the originals for purposes of  
3 estimation? If we can, I think (indiscernible) is done.

4 UNIDENTIFIED ATTORNEY: I think so, too.

5 MR. ESSERMAN: And Your Honor, this is Sandy  
6 Esserman. I think that that is something that is also  
7 achievable by the law firms and I would think that you could  
8 have a third permutation of that. And that is to the extent  
9 either the ACC or the debtor want to view originals that they  
10 can -- they have the right to request the law firm to view the  
11 originals as -- in the custody of both of the individual law  
12 firms. So, we've got sort of a double protection there.

13 Number one, we've got the certification that you just  
14 described. And number two, to the extent that anyone wants to  
15 view the originals on premises so we don't have a custody  
16 issue, and we don't have a issue of x-rays getting switched out  
17 which you certainly do when you're dealing with 5,000 x-rays.  
18 That would solve those problems.

19 MR. BERNICK: But we wouldn't want that third option  
20 because we would -- if the way that this reads out now, is that  
21 the originals are sent out for copying and their -- the request  
22 is made that the copy center make them identical. And when  
23 they come back pursuant to the request, anybody appearing at  
24 the hearing will -- that there will be a stipulation that  
25 anybody appearing at the hearing will accept the copies as

1 being identical with the original for the purposes of the  
2 estimation. There won't be any need to look for an original.

3 MR. ESSERMAN: Well, I'm not appearing at the  
4 estimation. It's really Nate Finch and --

5 MR. BERNICK: But what -- that's fair. I understand  
6 that. But whoever it is that's being there, that becomes the  
7 key because after the provision to make the originals  
8 available, and that becomes an avenue that people have not to  
9 enter into the stipulation or not to send the documents out for  
10 copying that were back --

11 MR. ESSERMAN: No, that's not what I said.

12 MR. BERNICK: I'm not suggesting it is what you said.

13 MR. ESSERMAN: No.

14 MR. BERNICK: I'm saying -- I'm saying that I'm  
15 concerned that that's what will happen.

16 MR. ESSERMAN: Well, from the firm standpoint, it's  
17 very simple. I'm willing to live with what the Court suggested  
18 which I think is a variation of what I suggested. And forget  
19 my permutation. I would -- I was basically trying to be  
20 helpful so the debtor and the ACC -- create the problem. We  
21 just as soon -- we'll make our copies. We'll do everything at  
22 Grace's expense. We'll get that certification that says we  
23 requested that they be identical, that we have no reason to  
24 believe that what we got back is not a duplicate of the  
25 original. And we'll send them -- we'll send them off to Grace

1 for the -- for Grace and the ACC to inspect that.

2 From the firm -- from the firms that I represent,  
3 from our perspective, that is not a problem.

4 THE COURT: Ms. Ramsey?

5 MS. RAMSEY: Your Honor, I have one other permutation  
6 that I'm aware of, and there could be others, I'm told that in  
7 some instances, the law firms have copies. And those copies  
8 are for all practical purposes the original because the  
9 hospital that has possession of the original has destroyed the  
10 original. And that when a copy is made of a copy of an x-ray,  
11 that is almost never in that circumstance is as good as the  
12 original copy or the original.

13 And so in that circumstance, what I guess I want to  
14 throw that out because the firms are then in a position of I  
15 guess either being forced to stipulate that an inexact copy is  
16 good enough. Or they're going to be forced to relinquish  
17 custody control --

18 MR. ESSERMAN: Well this is only for exploration  
19 though.

20 MS. RAMSEY: -- original evidence.

21 THE COURT: Ms. --

22 MR. ESSERMAN: This is only for estimation. This is  
23 not for -- this is not individual claims litigation.

24 MS. RAMSEY: Understood.

25 THE COURT: But Ms. Ramsey, how many firms, how many

1 x-rays are we talking about in that category, do you know?

2 MS. RAMSEY: I do not know, Your Honor. I believe  
3 that this is the case with the -- for instance the Paul,  
4 Hanley, Harley firm, I believe that is their circumstance with  
5 that -- with respect to that particular firm, they were  
6 prepared to work with the debtor to, you know, relinquish  
7 control of their original copies. But I know that there are a  
8 couple of other firms that have -- have that situation with  
9 respect to limited cases, not their entire client list.

10 And I don't know what the number of the those  
11 additional situations are. And in some instances, the firms  
12 are reluctant and don't wish to relinquish control of what is  
13 essentially their original evidence.

14 THE COURT: Well, I think the debtor is going to have  
15 to make a choice. If the debtor can work out a deal with the  
16 particular firm to get a temporary, you know, exchange or  
17 release of custody, to look at those x-rays, fine. Or go look  
18 at them on site, fine. Or else take them out of the data base.  
19 I mean, you know, I don't think one order is going to solve all  
20 these problems. It just isn't. So --

21 MR. BERNICK: As a practical matter, here -- is that  
22 Nate?

23 MR. FINCH: Yes, I --

24 MR. BERNICK: Go ahead, I was going to ask you a  
25 question, but go ahead.

1 MR. FINCH: I think it sort of falls into two camps.  
2 I can't speak for the Future Claimants Representative who I  
3 understand is on the phone.

4 UNIDENTIFIED ATTORNEY: I am.

5 MR. FINCH: But the ACC, I believe would be -- would  
6 be willing to live with an order or stipulation that says, if a  
7 claimant law firm has either originals or copies of originals  
8 of x-rays, and sends those out for copying and then sends in  
9 the copy to the debtor with a certification that says, we have  
10 asked a copying facility to make an identical copy of the x-ray  
11 that we have in our possession, and we have no reason to  
12 believe that the x-ray is not identical in all material  
13 respects to the copy that we have in our possession, then the  
14 ACC is not going to go behind that and challenge that for  
15 purposes of the estimation hearing.

16 However, if for whatever reason that certification  
17 isn't able to be made, I mean, some people may not be able to  
18 have access to the type of high quality x-ray scanning facility  
19 that could -- that you could in good faith or in good  
20 conscience say that the copy is identical in all -- you know,  
21 we have no reason to believe that the copy isn't the same as  
22 the original. Then I do think that -- there has to be a  
23 separate provision for that would effectively say that -- in  
24 that case, people would know that they would have to go look at  
25 both the original/copy, whatever happens to be in the

1 possession of the firm.

2 And if it means that, you know, out of the 5,000 that  
3 1,000 of them drop out, then, you know?

4 MR. BERNICK: Well, it won't be -- go ahead, I'm  
5 sorry.

6 THE COURT: Okay, who's representing the FCR?

7 MR. MULLADY: This is Raymond Mullady, Your Honor  
8 representing the Future Claimants Representatives.

9 THE COURT: Yes, sir.

10 MR. MULLADY: Our position on this is that the  
11 majority of this compromise that's being discussed is  
12 acceptable. The only reservation that we have is, we don't  
13 believe we can nor should we be required to stipulate in the  
14 blind that copies are the equivalent of originals without the  
15 ability to be able to look at originals in the event that in  
16 the course of discovery, the debtor's experts -- or experts for  
17 any other adverse party -- make a statement about findings from  
18 a copy where an original exists that -- which opinion does not  
19 seem to comport with reality of the x-ray or what we would  
20 anticipate would be shown in the original. We don't want to  
21 -- nor do we believe we should be compelled to agree to  
22 stipulate or waive our right to have our experts look at that  
23 original.

24 THE COURT: Okay.

25 MR. BERNICK: Well, that's fine. But then -- but

1 then, it seems to me that the exception that you've created  
2 -- would then mean that you would go look for the original and  
3 we would look for the original when we don't have access to the  
4 original.

5 MR. MULLADY: -- it fall legally on all parties --

6 MR. BERNICK: Yes.

7 MR. MULLADY: -- to use the originals for that  
8 purpose if they deem that they need to do that to protect their  
9 client's rights. That's our view.

10 MR. BERNICK: Okay, well, so concretely --  
11 concretely, the procedure would be that by a certain date  
12 presumably we can agree to, the law firms will furnish copies  
13 that they believe to be identical copies that -- with that  
14 -- for purposes of the estimation, that the FCR and the ACC  
15 will agree that to the extent that the different firms have  
16 said that -- by that I mean, putting the language that was in  
17 the Wartnick letter, they don't have reason to believe that  
18 they are not identical.

19 If the ACC and the FCR will agree for purposes of the  
20 estimation, the copies will be treated as identical. However  
21 if at any time, either the ACC or the FCR believe in the course  
22 of expert discovery that they would like to have access to the  
23 originals for purposes of testing that proposition, at that  
24 point, everybody will then have access to the originals and  
25 whatever comes from that, comes of that. That way, really, I

1 hope it will be in fact the exception and in a sense the burden  
2 of its being made to the exception falls equally on all sides.

3 MR. MULLADY: And I would just add, Mr. Bernick, that  
4 -- we would also want that order to say that we would not be  
5 precluded from drawing a distinction between the original and  
6 the copy, notwithstanding the certification that there's no  
7 reason to believe that there's a distinction.

8 MR. BERNICK: Well --

9 THE COURT: That circumstance, you're talking about  
10 if -- it's -- basically what you're saying is, if some report  
11 now comes in that so far different from the original report  
12 based on the original x-ray viewing that you've got some  
13 question about it, you want the rights to go back and look at  
14 the original. And I think all parties probably want that  
15 right.

16 MR. MULLADY: That's correct, Your Honor.

17 MR. BERNICK: Well, wait, Your Honor. Just be -- I'm  
18 not sure that any of this may actually work. Just to be very  
19 clear, we expect that there is going to be a dramatic  
20 difference because the whole difference is having one reader  
21 who looks at it versus other readers -- that is, more than one  
22 reader look at it, and the relationship that exists between the  
23 first reader in the law firm. It's not -- we expect that there  
24 is going to be a very significant difference.

25 Now, the question -- what we want to eliminate is any

1 argument that the difference is due to the copying process.  
2 That's all that we're doing is trying to eliminate that. And  
3 we're prepared to work with, you know, all that we've talked  
4 about so far and in deed Mr. Mullady's concern that he'll want  
5 to test out what it is that our experts do. But then you have  
6 to be -- unless -- it's not driven by whether the statistics or  
7 the results turn out to be different. It has to be driven by  
8 -- and in some sense that the copy really is not a good copy.  
9 But --

10 THE COURT: Well, that's fine. And if it turns out  
11 not to be a good copy, he wants the right to be able to use the  
12 original --

13 MR. BERNICK: But --

14 THE COURT: -- notwithstanding the stipulation, I  
15 think --

16 MR. BERNICK: Sure.

17 THE COURT: -- he's got that right, too.

18 MR. BERNICK: Sure, but then it really has -- the  
19 difficulty. If we then go through the process, let's say that  
20 -- let's say that there is a difference in the thousand he  
21 reads, then presumably, we're going to look at 1,000 original  
22 x-rays. That is going to take a significant period of time.  
23 What we can't do is be in the position where ultimately the  
24 fact of copying -- the fact that their being a copy is made  
25 into a substantive reason for rejecting the testimony and the

1 opinion of our expert. And we don't have the ability to  
2 address that.

3 THE COURT: You do have the ability because you have  
4 the same right to go back at the original. If they test it,  
5 then you can test it.

6 MR. BERNICK: I understand that. That is -- that is  
7 -- what we want to eliminate is anything that says that  
8 somebody at the time of estimation can come back and say, well,  
9 because I have not had the opportunity to look at each and  
10 everyone of the originals that I want to look at, then I'm no  
11 longer going to be prepared to stand by the stipulation.

12 THE COURT: No, I'm talking about the particular  
13 originals that somebody goes to look at -- if someone goes to  
14 look at an original --

15 MR. BERNICK: Right.

16 THE COURT: -- and that original turns out to be far  
17 different from the copy --

18 MR. BERNICK: Right.

19 THE COURT: -- then notwithstanding the stipulation  
20 as to that particular x-ray, you can use the original and not  
21 the copy.

22 MR. BERNICK: And both sides will have access to it,  
23 yes.

24 THE COURT: Right.

25 MR. BERNICK: I've no -- I've no quarrel with that.

1 THE COURT: Okay. Then that's the issue. It's not a  
2 way around the entire stipulation. Mr. Mullady, you're not  
3 suggesting that's a way around the entire stipulation.

4 MR. MULLADY: Of course not, Your Honor. We would  
5 envision this to be the rare circumstance where there's a  
6 genuine issue presented as to whether an accurate  
7 interpretation has been made on a copy of an x-ray for reasons  
8 that events that the copy being viewed is not representative of  
9 what must have been in the original when the report was made.  
10 This would be -- in our estimation, the extraordinarily rare  
11 circumstance.

12 And this is only -- I should make myself very clear  
13 on this. This is only to protect against the erosion of our  
14 due process right to assert a position add to a particular  
15 interpretation of a film in the absence of any finding by this  
16 Court to date, and I've heard none on this call, that there has  
17 been a violation of this order of December 22, 2006.

18 And we would -- we would have a strong due process  
19 objection and a point for appeal I would respectfully submit if  
20 an order were made without a finding of a violation of a  
21 discovery order that effectively sanctions the Future Claimants  
22 Representative from being able to or preclude it from making an  
23 argument that he otherwise would be entitled to make. And I  
24 would respectfully submit that that is the issue that I'm  
25 making this point on, again, noting that we would anticipate it

1 being the rare circumstance.

2 MR. BERNICK: Let me try to -- I'm not going to  
3 respond to that, but --

4 THE COURT: Can we cut through this because --

5 MR. BERNICK: Yes, well --

6 UNIDENTIFIED ATTORNEY: Your Honor?

7 MR. BERNICK: But there's one -- there is one part  
8 that I don't think that we've addressed -- nailed it down. And  
9 that is going back to Natalie's situation where she's got a  
10 firm that has -- that says, I've got the original or I've got a  
11 copy. There is no copy that is going to be as good as this.  
12 And that's just it. I'm not going to -- I'm not going to say  
13 that I -- I'm not going to make the statement that appears in  
14 the Wartnick letter that I --

15 THE COURT: Then you have to go look at that.

16 MR. BERNICK: Well, if that point --

17 THE COURT: Or take them out of the data base.

18 MR. BERNICK: Well, no, you can't take it out of the  
19 data base.

20 THE COURT: Well.

21 MR. BERNICK: Then you have selection bias. That  
22 anybody -- we don't know why they're doing it. We don't know  
23 whether it's strategic or not. I mean you certainly can't have  
24 -- it's not a representative event. It is the events that  
25 arises by virtue of circumstances that are non-random.

1           It would be clear selection bias, probably, you just  
2 can't move forward with that kind of situation. What we would  
3 say in those circumstances, is that it's at least there. Those  
4 people who are not prepared to say -- to say what this -- and  
5 therefore -- we wouldn't be able to trigger the undertaking of  
6 both the FCR and the ACC and counsel on this call. And that  
7 narrow circumstance, either that copy or that original should  
8 be forwarded to the custody of the Court because there's no  
9 other way to proceed.

10           MS. RAMSEY: Your Honor, may --

11           THE COURT: You can go look -- yes, you can go look  
12 at them.

13           MR. BERNICK: But, Your Honor says there is no --

14           THE COURT: Mr. Bernick --

15           MR. BERNICK: -- there's no incentive, that any --

16           THE COURT: Mr. Bernick, you need to get a handle on  
17 how many there are. You've submitted I don't know how many  
18 pages, probably 40 or 50 pages of exhibits today indicating how  
19 many x-rays have already come in and how many have not.

20           MR. BERNICK: I know -- I know what the answer is,  
21 Your Honor, it's a very -- the number of people who have  
22 actually given us the certification is a total of 704 claimants  
23 out of 5,000.

24           THE COURT: But that doesn't mean that they're going  
25 to say -- that of those, the rest, that they're going to say

1 that the hospital has destroyed the original and they only have  
2 a copy.

3 MR. BERNICK: Well, no, I've got 17 law firms that  
4 have sent in x-rays, but have not submitted certification.  
5 That's 910 claimants.

6 THE COURT: I understand. But Ms. -- if I am -- Ms.  
7 Ramsey, maybe I should let you address this. My -- I  
8 understood that you were talking about the circumstance where  
9 the firm had a copy, the hospital had destroyed the original,  
10 and so the copy was at this point, all that was left?

11 MS. RAMSEY: That's correct. Your Honor, moreover, I  
12 wanted just to reiterate for the record, with respect to a  
13 number of issues that have been identified during today's call,  
14 the clients that I represent are prepared to work with the  
15 debtor. I'm not saying that in every circumstance, we'll reach  
16 an accommodation, but I believe in many of them, we will if the  
17 debtor contacted us.

18 For example, with respect to the Wartnick firm, the  
19 Wartnick firm went very far to try to get the debtor the  
20 comfort it wanted, but it wasn't able to make the precise  
21 certification.

22 UNIDENTIFIED ATTORNEY: Yes.

23 MS. RAMSEY: At the end of that letter, the Wartnick  
24 firm specifically said, if you have any concerns about the  
25 certification, please let us know. With respect to Paul,

1 Hanley, Harley who appear on the list of those who have not  
2 provided a certification, as I've indicated, there's a reason  
3 for that that I've articulated. And that firm is prepared to  
4 work with the debtor.

5 Maybe what makes most sense to me at least is that  
6 the debtor engage in a dialogue with the law firm and to the  
7 extent that there are problems that we then identify those  
8 problems and let the Court work them out.

9 MR. BERNICK: I'm happy to do that. That's what I  
10 was going to get to is that it seems to me that this week we  
11 have to have a follow up call with the people who are on this  
12 call to hammer out the details of how this is going to occur  
13 and when it's going to occur.

14 All that I'm saying, Your Honor, is that I take at  
15 face value when Natalie says that her clients are prepared to  
16 work this out. I take that at face value. I know Natalie. I  
17 think that will happen. I don't know the same thing will  
18 happen with respect to many of these other firms, I just don't  
19 know. We're prepared to go down the road to check and try it  
20 out.

21 But our history here says that the exception can't  
22 swallow the rule. That's what we want to avoid. All that I'm  
23 saying is that with respect to the situation where we just  
24 can't get access to the originals of the -- by sending three  
25 people around the country to pick our pockets, at that point, I

1 think my client is entitled to resort to what would be a very  
2 exceptional circumstance we owe, that they have the documents  
3 or have the originals deposited with the Court.

4 I hope we don't have to do that at all. But I don't  
5 want to have this call end with somehow the notion that this  
6 then comes up to each individual firm to tell us what they're  
7 prepared to do because I think a lot of these firms will not  
8 treat this the same way that perhaps the Wartnick does, and  
9 will say, to hell with them.

10 THE COURT: Well, I don't know that I'm prepared to  
11 address that until I find out who gives you a certification  
12 that in fact the original has been destroyed because that's the  
13 only -- at least the only one I can think of now -- reason why  
14 a copy of an original can't be produced.

15 MR. CANDON: Your Honor?

16 THE COURT: Yes.

17 MR. CANDON: Chris Candon for the Libby claimants.

18 THE COURT: Yes.

19 MR. CANDON: And that is actually the scenario that  
20 we're working we're faced with right now. That we do actually  
21 have an original, but the doctor is not willing to state that  
22 the original can be duplicated to the point of it being an  
23 exact duplicate.

24 THE COURT: Well --

25 MR. CANDON: So, in that scenario, there are seven

1 claimants. And we said, you know, if we can get these on  
2 digital, we'll give them to Grace. And I think that that's --

3 MR. BERNICK: I think that's fine.

4 MR. CANDON: -- to Grace. But if we can't put it on  
5 a digital, then they have to come to Montana.

6 MR. BERNICK: Well, then we'll --

7 MR. CANDON: And which you already have people there.  
8 So --

9 MR. BERNICK: For seven -- for seven people, I don't  
10 think we should take up more time on this call. The Libby  
11 situation actually is a special situation because they claim  
12 there's some kind of special disease.

13 But Your Honor has said, let's try to work it out and  
14 see how many people really are the exception. We're prepared  
15 to do that.

16 THE COURT: Mr. Candon --

17 MR. CANDON: Okay, well, if that's the case, if  
18 that's it, then I'm willing to work with, you know, Grace on  
19 that situation. I just wanted to say because I think we are a  
20 little bit different from what was being stated on the call.

21 THE COURT: Well, but I think in your circumstance,  
22 you do have an original, so it can be copied. The only issue  
23 is, you would then be in the position of being one of those  
24 firms who would say, I certify that I asked that a duplicate  
25 copy of the original be made. And then when you get it back,

1 certify that in fact, you have back the copy that you asked to  
2 be an -- to be a duplicate of the original and that that's what  
3 you're sending to Grace that you have no reason to believe that  
4 it's not a duplicate.

5 MR. CANDON: We have no reason to believe that it's  
6 as good as the original because we have been told by the  
7 doctor.

8 THE COURT: Not as good as the -- well, okay. I  
9 guess --

10 MR. CANDON: There's a distinction there.

11 THE COURT: -- the original.

12 MR. CANDON: Yes, the distinction that the Ward Black  
13 is different than that firm.

14 THE COURT: Okay, well, I think in those couple of  
15 cases, maybe you are going to have to try to work something out  
16 with both the debtor and the ACC and the FCR to make sure that  
17 all of them are on board with whatever the certification is  
18 because --

19 MR. CANDON: That's fine. I just wanted to make sure  
20 that at least --

21 MR. BERNICK: We'll try to work that out. What I  
22 -- I think that Your Honor -- I don't want to seem presumptuous  
23 here -- I think that we probably have enough to have this  
24 follow up call. I think it's important though if Your Honor  
25 can express the desire to have that done this week so that we

1 know where things are. And the people who come on to the call,  
2 pretty knowledgeable about what their constituent firms are  
3 -- what the firms that they're representing, what their view is  
4 going to be about this so that we can come out of that call  
5 with some notion of, you know, do we really have a continuing  
6 problem or not?

7 I think that -- I guess to put it simply, I think  
8 we've probably gone as far today as we can go. And I think we  
9 ought to have a follow up call to see if we could reduce it to  
10 writing.

11 MR. FINCH: Your Honor, this is Nathan Finch from  
12 Caplin and Drysdale for the Asbestos Claimants Committee. I  
13 agree with that. I would, I guess, ask for a recognition that  
14 sometimes the perfect is the enemy of the good. If I  
15 understand the figures here, the debtor already has 1,600  
16 x-rays, people have either sent in with a certification or  
17 without a certification, but the people that have sent it in  
18 believe that, you know, the copy was -- is good as what they  
19 had in their files. And then apparently there's another 1,296  
20 in the Angelos firm which I understand from what Mr. Esserman  
21 said, they were trying to work out some kind of a certification  
22 language but that it wasn't acceptable to Grace, but they're  
23 willing to submit the copies. That gets you, you know, to well  
24 over half of the 5,300 --

25 MR. BERNICK: I understand that, but that's not

1 -- what I'm saying is the gross number, 25, 30, 50, it's  
2 -- that doesn't mean anything to people who are operating on  
3 the basis of offering an expert opinion based upon  
4 statistically sound samples. Either have a statistically sound  
5 sample or you have the total population or something that comes  
6 pretty close to it.

7           We for a variety of reasons because of the small  
8 numbers that we have with some of these firms, felt that we  
9 could not do a statistically significant sampling. We did not  
10 do a statistically significant sampling. And therefore, you've  
11 got to go with the whole. That's very, very important. You  
12 can't say, well, gee, it looks like it's kind of a lot of  
13 people; therefore, it's sound. It doesn't work that way.

14           MR. FINCH: Well, there's nothing --

15           THE COURT: That's okay. If they want them all,  
16 we're going to do the best we can to get them all or as close  
17 to all as possible. When originals don't exist, if there are  
18 copies, and they want copies of copies, we'll try to get them.  
19 If they want to go look at the copies because someone won't say  
20 that a copy of a copy is good enough, they have the right to go  
21 look at the copies.

22           I think you folks certainly -- I hope you folks can  
23 try to work this out. You're all going to have the same  
24 discovery problem. So, at some point, you really do need to  
25 work this issue out. If you're all going to want to see the

1 original -- when I say original in this instance, where the  
2 originals are destroyed, all that exists is the copy -- if the  
3 certifications come back saying the copy of that copy just  
4 isn't worth the paper it's printed on, you're all going to want  
5 to see them. So, why don't you see if you can't figure out a  
6 method that's going to facilitate all of your looking at them  
7 rather than hampering them because that is going to be  
8 necessary. You're all going to want to look at them.

9           So, you know, something that protects the chain of  
10 custody makes the law firms who have the custody of those  
11 x-rays feel comfortable that it isn't going to be a big mixup  
12 and you know some kind of traffic jam somewhere down the road,  
13 is necessary. If it means putting them into the custody of the  
14 Court for a while, fine. If you can put them in a repository  
15 that everyone agrees to, fine. If it means that you have to go  
16 look at them in the law firm premises, you know, fine. I don't  
17 think (indiscernible) if that's the way it has to be, then  
18 that's the way it has to be.

19           But why don't you folks have a call this week that's  
20 not a request. That's an order. But during that call, see if  
21 you can't work out that specific detail as well as language for  
22 this order. I'm not making findings in response, Mr. Mullady,  
23 to your comment. I'm not making findings that there was any  
24 violation of the prior order. But it does seem to me that the  
25 prior order could be tweaked a little bit to make it more -- I

1 guess more readily workable for all parties concerned,  
2 including the law firms who are trying to comply with the  
3 order, but for whatever reason, compliance just isn't as easy  
4 as everyone thought it would be. So, for purposes of ease of  
5 convenience of all parties including the debtor, the ACC, the  
6 FCR, and the law firm, I think it may be advisable to modify  
7 this order. So, why don't you all sit down this week, see if  
8 you can come up with acceptable language.

9           Mr. Bernick or Ms. Baer, perhaps one of you can call  
10 Pittsburgh chambers. See if you can set up a time for a  
11 continued status call next week with me. Unless you can submit  
12 an agreed upon order on a certification of counsel on say the  
13 day before whatever that call will be.

14           So, give yourselves a week perhaps to work out an  
15 agreed order. Set up a conference call the day or so after  
16 that. And in the event that a certified -- a certification  
17 comes in, we won't need the call. If a certification doesn't  
18 come in, then we'll see where you stand.

19           MR. FINCH: Your Honor, may I suggest that while we  
20 have the people on the call, we try to work out a time when  
21 people are available this week to do the (indiscernible)  
22 involved call if Your Honor would indulge us with letting us  
23 use your --

24           MONA: Judge, this is Mona, Your Honor.

25           THE COURT: Yes.

1 MONA: There is a hearing set for February 14 on the  
2 Foster and Sear matter so, if you want put a continued hearing  
3 on this on that same date and time --

4 THE COURT: What time is it, Mona?

5 MONA: It's February 14th. I believe it's at ten in  
6 the morning by phone.

7 THE COURT: How's that -- then we'll do this?

8 MR. FINCH: I have the following suggestion to throw  
9 out. I have a lot of things going on this week. The only time  
10 I'm absolutely not available is after six p.m. tomorrow night.  
11 So, I would have a suggestion that we try to have a call with  
12 the people who are on the phone now, say Wednesday, and have  
13 the debtor circulate a court order/stipulation maybe by close  
14 of business tomorrow for people to look at in advance of the  
15 Wednesday afternoon call.

16 MS. RAMSEY: This is Natalie Ramsey. I'm available  
17 with the afternoon.

18 MR. BERNICK: Yes, I could probably do the same, as  
19 well. That's fine. We'll work out --

20 MR. FINCH: Sandy, are you available Wednesday  
21 afternoon, since you're the lawyer that probably represents the  
22 most claimants in this?

23 THE COURT: Did we loose parties?

24 MR. ESSERMAN: Hello, hello. I'm just thinking.

25 THE COURT: Oh, sorry, I couldn't hear you.

1 MR. ESSERMAN: I had you on mute, I'm sorry. I'm  
2 available late on Wednesday probably three o'clock central,  
3 four o'clock eastern?

4 MR. FINCH: Why don't we try to reconvene four  
5 o'clock central -- excuse me, four o'clock eastern time.

6 MR. BERNICK: Okay. If Your Honor -- it would be all  
7 right with us at least if you wanted to have an update on this  
8 on the 14th.

9 THE COURT: That's fine. Why don't we continue this  
10 matter to February 14th at ten. Though I have the Foster and  
11 Sear argument scheduled at ten, so we'll do this as soon as  
12 that argument is over?

13 MR. ESSERMAN: And Your Honor, just so you know from  
14 a time perspective -- this is Sandy Esserman speaking -- my  
15 guess is that the Foster and Sear matter will take five or ten  
16 minutes that I suspect whereby they will be in full compliance  
17 by the time of that hearing.

18 THE COURT: Okay. Well, if that's the case, that's  
19 good. Then everyone just call in as though for a ten o'clock  
20 hearing and I'll get to it as close to ten as I can.

21 MR. FINCH: Just so, we're clear, the debtor will  
22 circulate a dial-in number for four p.m. eastern time call on  
23 Wednesday.

24 And could -- David Bernick, is it possible for you to  
25 circulate a proposed stipulation/order based on what we talked

1 about by the close of business, Chicago time, tomorrow so we  
2 could have something to look at?

3 MR. BERNICK: Well, I think it's always possible.  
4 I'm going to be from L.A. --

5 MR. FINCH: Possible or reasonably practical?

6 MR. BERNICK: Yes, I'm going to be taking the red eye  
7 this evening. So, it depends on when I can climb out of bed  
8 tomorrow and what Barbara Harding is doing. But we will  
9 endeavor to do that.

10 MR. ESSERMAN: Okay. And one other thing before I  
11 leave. I just want to correct the record on the Angelos  
12 situation. The Angelos situation was that the x-rays were at a  
13 hospital and the hospital had some administrative charges that  
14 needed to be paid. It's my understanding that Grace will pay  
15 those administrative charges. And that will solve the x-ray  
16 --there should not be a problem getting a -- copies made with  
17 the appropriate certification.

18 MR. BERNICK: I don't know what the administrative  
19 charges are, but that's certainly something that we can talk  
20 about.

21 MR. ESSERMAN: Well, they're third party charges.

22 MR. BERNICK: I don't know what they are. There's no  
23 point in talking about that now. We'll just take that up when  
24 we talk on Wednesday.

25 MR. ESSERMAN: That's fine.

1 THE COURT: Okay, folks, are we finished then for  
2 today?

3 MR. BERNICK: Yes, thank you very much.

4 UNIDENTIFIED ATTORNEY: Thank you, Your Honor.

5 THE COURT: Adjourned.

6 UNIDENTIFIED ATTORNEY: Thank you.

7 \* \* \* \* \*

8

9 **C E R T I F I C A T I O N**

10 I, Vidhya Veerappan, court approved transcriber,  
11 certify that the foregoing is a correct transcript from the  
12 official electronic sound recording of the proceedings in the  
13 above-entitled matter, and to the best of my ability.

14

15 /s/ Vidhya Veerappan DATE: February 12, 2007

16 VIDHYA VEERAPPAN

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